THE DRED SCOTT DECISION, IN THE LIGHT OF CONTEMPORARY LEGAL DOCTRINES[1]

HAVING had occasion recently to renew my acquaintance with the case of Scott *v.* Sandford,[2] I have become persuaded that the usual historical verdict with reference to it needs revision in three important particulars: first, as to the legal value of the pronouncement in that case of unconstitutionality with reference to the Missouri Compromise; secondly, as to the basis of that pronouncement; thirdly, as to the nature of the issue between Chief Justice Taney and Justice Curtis upon the question of citizenship that was raised by Dred Scott's attempt to sue in the federal courts.[3]

The main facts leading up to and attending this famous litigation may be summarized as follows:[4] Dred Scott, a slave belonging to an army officer named Emerson, was taken by his master from the home state, Missouri, first into the free state of Illinois and thence into that portion of the national territory from which, by the eighth section of the Missouri Compromise, slavery was "forever" excluded. Here master and slave remained two years before returning to Missouri, the latter in the meantime having married with his master's consent. In 1852 Dred sued his master for freedom in one of the lower state courts and won the action, but upon appeal the decision was reversed by the supreme court of the state, upon the ground that Dred's status at home was fixed by state law regardless of what it was abroad—a decision which plainly ran counter to the whole trend of decision by the same court for the previous generation. Thereupon the case was remanded to the inferior court for retrial but Dred, having in the meantime upon the death of Emerson passed by bequest to Sandford, a citizen of New York, now decided to bring a totally new action in the United States circuit court for the Missouri district, under section 11 of the Act of 1789. In order to bring this action Dred had of course to aver his citizenship of Missouri, which averment was traversed by his adversary in what is known as a plea in abatement, which denied the jurisdiction of

[1] In substance this paper was read before the American Historical Association at its last annual meeting, December 29, 1910.

[2] 19 Howard 393–633 (cited below as "Rep").

[3] See James Ford Rhodes, *History of the United States,* II. 251 *et seq.*; James Schouler, *History of the United States,* V. 377 *et seq.*; Nicolay and Hay, *Abraham Lincoln,* II., ch. 4; Theodore Clarke Smith, *Parties and Slavery,* ch. 14.

[4] The agreed statement of facts is to be found, Rep. 397–399.

the court upon the ground that Dred was the descendant of African slaves and was born in slavery. The plea in abatement the circuit court overruled, but then proceeded to find the law on the merits of the case for the defendant Sandford; and from this decision Dred appealed to the United States Supreme Court.

Scott *v.* Sandford was first argued before the Supreme Court in the December term of 1855. From a letter of Justice Curtis we learn that in the view the court took of the case, it would find it unnecessary to canvass the question of the constitutionality of the Missouri Compromise.[5] And indeed it was evidently of a mind to evade even the question of jurisdiction, as raised by the plea in abatement, had it not been for the fact, as it presently transpired, that Justice McLean, a candidate for the Republican presidential nomination, had determined to make political capital of the controversy by writing a dissenting opinion, reviewing at length the history of African slavery in the United States from the Free Soil point of view. McLean's intention naturally produced some uneasiness among his brethren and particularly such as came from slave states, three of whom now began demanding reargument of the questions raised in connection with the plea in abatement.[6] This demand being acceded to, the case came on for reargument in the December term of 1856, that is, after the presidential election was over. Yet even now it was originally the purpose of the court to confine its attention to the question of law raised by the circuit court's decision, which rested upon the same ground as the state supreme court's earlier decision, and Justice Nelson was commissioned to write an opinion sustaining the circuit court.[7] Since the defeat of Fremont, however, and Buchanan's election, the advantage of position lay all with the pro-slavery membership of the court. Some of the latter contingent, therefore, but chiefly Justice Wayne of Georgia, who had on another occasion displayed a rather naive view of the judicial function, now began bringing forward the notion that, as expressed in Wayne's very frank opinion, "the peace

[5] Curtis to Ticknor, April 8, 1856. George Ticknor Curtis, *Life of Benjamin Robbins Curtis,* I. 80.

[6] Ashley of Ohio's positive testimony on the basis of report current at the time Scott *v.* Sandford was pending, supplies the explanation needed of the demand for reargument, since the final disposition of the case would be precisely the same whether the circuit court were held to have erred in taking jurisdiction or, having rightfully taken jurisdiction, to have properly decided the case on its merits. *Congressional Globe,* 40th Cong., 3d sess., App., p. 211. See also McLean's opinion, Rep. 529–564, and Curtis's animadversions on the same, *ibid.,* 620.
620.

[7] Rep. 529–564. The fact that Nelson was commissioned to write an opinion *sustaining* the lower court again shows that intrinsically the question of the lower court's jurisdiction was regarded as unimportant.

and harmony of the country required the settlement . . . by judicial decision" of the "constitutional principles" involved in the case.[8] Yielding at last to this pressure, Chief Justice Taney consented to prepare "the opinion of the Court", as it is labelled, covering all issues that had been raised in argument before the court in support of the defendant's contentions. What was to be the scope of the court's decision was known to Alexander H. Stephens, as early as January, 1857,[9] and undoubtedly to Buchanan when he delivered his inaugural address. And to know what scope the decision was to take was equivalent practically to knowing its tenor, since it was extremely improbable that a majority of the court would have allowed so broad a range to inquiry had they not been substantially assured beforehand of its outcome. When, therefore, Buchanan in his inaugural address bespoke the country's acquiescence in the verdict of the court, "whatever it might be", his very solicitude betrayed that, as Lincoln inferred, he was talking from the card.

For obvious reasons, hostile criticism of the Dred Scott decision has always found its principal target in the Chief Justice's opinion, and the gravamen of such criticism has always been that the great part of it, particularly the portion dealing with the Missouri Compromise, was *obiter dictum*. I do not, however, concur with this criticism, for reasons which I shall now endeavor to make plain. And in the first place, it ought to be clearly apprehended what difficulty attaches to a charge of this sort against a deliberate utterance of the Supreme Court of the United States, evidently intended by it to have the force and operation of law, and for the reason that the ultimate test of what *is* law for the United States is, and at the time of the Dred Scott decision was, the opinion of the Supreme Court. On the other hand, the Supreme Court is not theoretically an irresponsible body: by the very theory that makes it final judge of the laws and the Constitution it is subject to these; as by virtue of its character as court it is subject to the *lex curiae,* that is to say, is bound to make consistent application of the results of its own reasoning and to honor the precedents of its own creation. What the charge of *obiter dictum* amounts to therefore is this: first, that the action of the Chief Justice in passing upon the constitutionality of the eighth section of the Missouri Compromise was illogical, as being inconsistent with the earlier part of his opinion, the purport of which, it is alleged, was to remove from the court's consideration the record of the case in the lower court and, with it.

[8] Rep. 454–455.

[9] See Rhodes, p. 253, and references.

any basis for a pronouncement upon the constitutional question; and secondly, that the action of the Chief Justice was also in disregard of precedent, which, it is contended, exacted that the court should not pass upon issues other than those the decision of which was strictly necessary to the determination of the case before it, and particularly that it should not unnecessarily pronounce a legislative enactment unconstitutional. Let us consider these two points in order.

As already indicated, the primary question before the court upon the reargument was what disposition to make of the plea in abatement which the circuit court had overruled, thereby taking jurisdiction of the case,[10] and upon this point a majority of the court, including both Chief Justice Taney and Justice Curtis, ruled decisively both that the plea in abatement was before it and that the decision of the circuit court as to its jurisdiction was subject to review by the Supreme Court.[11] Evidently the charge of illogicality lies against only those judges of the above mentioned majority who, after overruling the plea in abatement and so pronouncing against the jurisdiction of the circuit court upon the grounds therein set forth, passed to consider the further record of the case, by which the constitutional issue was raised. But was such proceeding necessarily illogical? Upon this point obviously the pertinent thing is to consider Taney's own theory of what he was doing, which he states in substantially the following language at the conclusion of his argument on the question of the plaintiff's citizenship: but waiving, he says, the question as to whether the plea in abatement is before the court on the writ of error, yet the question of jurisdiction still remains on the face of the bill of exceptions taken by the plaintiff in which he admits that he was born a slave but contends that he has since become free; for if he has not become free then certainly he cannot sue as a citizen.[12] In other words, the Chief Justice's theory was, not that he was canvassing the case on its merits, which he could have done with propriety only had he chosen to ignore the question of jurisdiction, but that he was fortifying his decision upon this matter of jurisdiction by reviewing the issues

[10] *Supreme Court Reports, Lawyer's Edition,* bk. xv., 694, 697.

[11] This majority consisted of the Chief Justice and Justices Wayne, Daniel, Campbell, and Curtis. Grier considered it sufficient to canvass the question of the lower court's jurisdiction on the basis of the facts stated in the bill of exceptions. Nelson did not consider the question of jurisdiction. Catron and McLean did not deem the question of jurisdiction to be before the court.

[12] Rep. 427. Note also the Chief Justice's statement of the issue at the opening of his opinion, Rep. 400.

raised in the bill of exceptions, *as well as* those raised by the plea in abatement; in other words that he was canvassing the question of jurisdiction afresh.

The matter of the validity of the Chief Justice's mode of proceeding then comes down to this question: Is it allowable for a court to base a decision upon more than one ground and if it does so, does the auxiliary part of the decision become *obiter dictum?* Upon the general question of what constitutes *dictum* we find the writer in the *American and English Encyclopedia of Law* indicating the existence of two views among common-law courts. By one of these views none of a judicial opinion is decision save only such part as was necessary to the determination of the rights of the parties to the action. By the other view, on the contrary, all of an opinion is decision which represents a deliberate application of the judicial mind to questions legitimately raised in argument.[13] On the precise question above stated the writer speaks as follows:

> Where the record presents two or more points, any one of which, if sustained, would determine the case, and the court decides them all, the decision upon any one of the points cannot be regarded as *obiter.* Nor can it be said that a case is not authority on a point because, though that point was properly presented and decided in the regular course of the consideration of the case, another point was found in the end which disposed of the whole matter. The decision on such a question is as much a part of the judgment of the court as is that on any other of the matters on which the case as a whole depends. The fact that the decision might have been placed upon a different ground existing in the case does not render a question expressly decided by the Court a dictum.[14]

True, this exact statement of the matter is of comparatively recent date, but it is supported by judicial utterances some of which antedate the Dred Scott decision and others of which, conspicuously one by Chief Justice Waite in Railroad Companies *v.* Schutte, plainly purport to set forth long standing and settled doctrine.[15] It is apparent moreover that this is the only doctrine tenable, for, were the opposite view taken, the law would remain unsettled precisely in proportion as the court presumed to settle it, since with a decision resting upon more than a single ground it would be always open to those so disposed to challenge the validity of all but one of such

[13] *Encyc.* (2d ed.), "Dictum", IX. 452–453; "Stare Decisis", XXVI. 168–169. *Cf.* Carroll *v.* Carroll's Lessee, 16 How. 275, 287, and Alexander *v.* Worthington, 5 Md. 471, 487.

[14] *Ibid.*, 171. I am indebted for this reference to Elbert W. R. Ewing's *Legal and Historical Status of the Dred Scott Decision* (Washington, 1909). I may add that this is the sum total of my indebtedness to the work mentioned.

[15] 103 U. S. 118, cited with approval in Union Pacific R. R. Co. *v.* Mason City etc., R. R. Co., 199 U. S. 160.

grounds, and that one selected at whim. Thus granting—what indeed is evident—that Taney was under no necessity of canvassing both the question of Dred's citizenship and that of his servitude, yet since he did canvass both questions with equal deliberation, who is to say which part of his opinion was decision and which *obiter?*

However, it is urged that an exception must be made in the case of constitutional questions, which should be left undecided if possible. To quote Justice Curtis's protest against the Chief Justice's opinion: "a great question of constitutional law, deeply affecting the peace and welfare of the country, is not . . . a fit subject to be thus reached"; such is the argument.[16] So far however is this alleged exception from being justified by the history of the matter, that it would be far nearer the truth to say that, if constitutional cases comprise a class by themselves in this reference, they warrant an exceptionally broad view of the legal value of judicial opinion. Let us consider for example some of Chief Justice Marshall's decisions in this connection, but particularly his decision in Cohens *v.* Virginia.[17]

In that case the plaintiff in error had been indicted and subjected to trial and penalty under a Virginia statute for selling tickets for a lottery which Congress had chartered for the District of Columbia. As in the Dred Scott case, the primary question before the court was one of jurisdiction, though in this case the Supreme Court's own jurisdiction, which counsel for Virginia denied upon four grounds: first, that a state was defendant, contrary to the Eleventh Amendment; secondly, that no writ of error lay from a state court to the Supreme Court; thirdly, that if the act in question was meant to extend to Virginia it was unconstitutional; and fourthly, that it was not meant so to extend. Ultimately Marshall dismissed the case for want of jurisdiction upon the last ground, which involves no constitutional question, but before he did so he not only invited argument upon the other points, but in the greatest of his opinions he met and refuted every argument advanced by counsel for Virginia thereupon. Yet by the test set for Taney's opinion in the Dred Scott case, all the valuable part of this great decision is *obiter dictum,* and that of the most gratuitous kind, since its purport was not in support of but counter to the final disposition of the immediate issue before the court.[18] And in truth Cohens *v.* Virginia was

[16] Rep. 590.

[17] 6 Wheat. 264.

[18] The portion of Marshall's opinion in Cohens *v.* Virginia which comprises the leading decision on the point with which it deals runs as follows: "It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-

criticized by Jefferson[19] upon grounds quite similar to those taken by the critics of Chief Justice Taney's opinion in Scott *v.* Sandford, notwithstanding which, however, it has always been regarded as good law in all its parts and indeed was so treated and enforced, once and again, by the court over which Taney himself presided.[20]

The fact of the matter is that the critics of Chief Justice Taney take their view of the proper scope of judicial decision from the common law rather than from American constitutional law. Altogether, the only feasible definition, historically, of *obiter dictum* in the field of American constitutional law would seem to be, a more or less casual utterance by a court or members thereof upon some point not deemed by the court itself to be strictly before it and not necessary to decide, as preliminary to the determination of the controversy before it. Such an utterance, for example, is that of Chief Justice Marshall at the close of his decision in Brown *v.* Maryland, where he says that he "supposes" that the principles he has just applied to a case arising in connection with foreign commerce would also apply in a case of commerce among the states.[21] This pronouncement is obviously an aside upon a point not argued before the court and it is quite justifiably ignored by Chief Justice Taney in his opinion in the License cases,[22] whereas the rest of Marshall's opinion in Brown *v.* Maryland Taney treats as law, though the entire second portion of it, dealing with the commerce clause, was unnecessary, as the immediate issue before the court had already been disposed of under Article I., Section 10 of the Constitution.

Chief Justice Taney had therefore, it appears, an undeniable right to canvass the question of Scott's servitude in support of his decision that Scott was not a citizen of the United States, and he had the same right to canvass the question of the constitutionality of the Missouri Compromise in support of his decision that Scott was a slave. To all these points his attention was invited by arguments of counsel and to all of them he might cast it with propriety by a well-established view of the scope of judicial inquiry in such

examining the question whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State". By the test set by the critics of C. J. Taney's opinion in Scott *v.* Sandford, however, the above quoted utterance is not decision; for its author continues thus: ". . . But should we in this be mistaken, the error does not affect the case now before the court", the reason being that since Cohens was not a citizen of "another State", the Eleventh Amendment did not apply.

[19] *Writings* (Memorial Edition), XV. 297–298, 326, 389, 421, 444–452.

[20] R. I. *v.* Mass., 12 Pet. 744 (1838), and Prigg *v.* Pa., 16 Pet. 539 (1842). See also Taney's own opinion in United States *v.* Booth, 21 How. 506 (1858).

[21] 12 Wheat. 419, 449.

[22] 5 How. 504, 574–578; see also J. McLean, *ibid.*, 594.

cases. If then the decision rendered by six of the nine judges on the bench, that the Missouri Compromise was unconstitutional, is to be stigmatized as unwarrantable, which is all that the court of history can do with it, it is not by pronouncing it to have been *obiter dictum* but by discrediting, from the standpoint of the history of constitutional law antedating the decision, the principles upon which it was rested.

Turning then to consider the constitutional decision directly, we find our task simplified to this extent: that the entire court, majority and dissenting minority alike, are in unanimous agreement upon the proposition that, whatever the source of its power, whether Article IV., Section 3 of the Constitution or the right to acquire territory and therefore to govern it, Congress in governing territory is bound by the Constitution—a proposition to which the court has always adhered, though there has been latterly some alteration of opinion as to what provisions of the Constitution control Congress in this connection. And this was the question that troubled the majority in the Dred Scott case. The Missouri Compromise was unconstitutional, that was certain; but just why—that was immensely uncertain. The extremest position of all was taken by Justice Campbell, whose doctrine was that the only power Congress had in the territories, in addition to its powers as the legislature of the United States, was the power to make rules and regulations of a conservatory character "for the preservation of the public domain, and its preparation for sale or disposition". From this it was held to follow that whatever the Constitution and laws of the states "validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognise to be property".[23] This of course is the extremest Calhounism, from which it came later to be deduced, with perfect logic, that it was the duty of the federal government, not only to admit slavery into the territory, but to protect it there. But, as Benton showed in his famous *Examination of the Dred Scott Case,* this particular phase of Calhounism was, at the date of the Dred Scott decision, less than ten years old.

And it is at this point that we come upon the second error I had in mind at the outset of this paper, an error traceable to Benton, but ever since repeated by historians of the Dred Scott decision, namely, the assumption that that decision rested exclusively upon Calhounist premises. Nothing however could be farther from the fact, for though Justice Daniel of Virginia seems to go almost as

[23] Rep. 509–517; the quotations are from pp. 514 and 515.

far as Campbell in representing the power of Congress in governing the territories as a mere proprietary power of supervision, yet even he rejects Campbell's notion that Congress was the mere trustee of the states; while Justices Catron of Tennessee, an old Jacksonian Democrat, Grier of Pennsylvania and of similar traditions, Wayne, a Southern Whig, and the Chief Justice himself, could by no means consent thus to read the Constitution through the spectacles of the prophet of nullification. Upon what grounds then were these judges to rest their pronouncement of the unconstitutionality of the Missouri Compromise? Let us first take up the case of Catron and then turn to that of the Chief Justice, who spoke upon this point for himself, for Grier and Wayne, and to a great extent, for Daniel.

Catron paid his respects to the Calhounist point of view in the following words: "It is due to myself to say, that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution", namely that Congress has power really to govern the territories, "inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper." Setting out from this extremely personal point of view, Catron found that Congress possessed *sovereignty* over its territory, limited however in this case by the treaty with France, with which the anti-slavery article of the Missouri Compromise was, he held, incompatible, and always by the spirit of the Constitution, which stipulates for the citizens of each state the rights and privileges of citizens of the several states and demands that the citizens of all states be treated alike in the national territory. It is true that Catron draws the idea of the equality of the states to his support, but his concern is plainly for the rights of citizenship rather than the prerogatives of statehood.[24] And in this connection it is worth recalling that almost exactly thirty years before, as Chief Justice of Tennessee, Catron had rendered the decision in Van Zant *v.* Waddell,[25] which is the first decision in which the concept of class legislation is distinctly formulated as a constitutional limitation, and which is a landmark in the history of American constitutional law.

But the most strongly nationalistic, or more precisely *federalistic*, of all the opinions upon the constitutional question was that of the Chief Justice, who again followed Marshall in tracing the power

[24] Rep. 522–527.

[25] 2 Yerg (Tenn.) 260.

of Congress to govern territories to its power to acquire them. Upon what ground then was he to rest his condemnation of the Missouri Compromise? In one or two passages Taney speaks of Congress as "trustee", but it is as trustee of the "whole *people* of the Union" and for *all* its powers. The limitations upon the power of Congress must therefore, in this case as in all cases, be sought in the Constitution, "from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty".[26] From this it follows that when Congress enters a territory of the United States it cannot "put off its character and assume discretionary or despotic powers which the Constitution had denied to it": it is still bound by the Constitution. Therefore Congress can make no law for the territories with respect to establishing a religion, nor deny trial by jury therein, nor compel anyone to be a witness against himself in a criminal proceeding. "And", the Chief Justice continues, "the rights of private property have been guarded with equal care." They "are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[27]

Such then is the basis of the Chief Justice's decision: the "due process of law" clause of the Fifth Amendment. The striking feature of this objection to the prohibitory clause of the Missouri Compromise is its baffling irrelevancy. It is true that the Supreme Court had in 1855, in Murray *v.* the Hoboken Company,[28] laid down the doctrine that all legal process was not necessarily due process, that in providing procedure for the enforcement of its laws Congress was limited in its choice to the methods in vogue at the time of the adoption of the Constitution. But in the Dred Scott case no matter of procedure was involved, the antagonists of the law in question being opposed not to the *method* of its enforcement, but to its enforcement at all; not to the mode of its operation, but to its substance. If lack of due process therefore was chargeable in such a case, it was chargeable in the case of any enactment, penal or of other sort, no matter by what machinery it was designed to be car-

[26] Rep. 448–449. The italics are mine.
[27] *Ibid.*, p. 450.
[28] 18 How. 272.

ried out, if the general result of its enforcement would be to diminish someone's liberty or property for no fault of his own, save as determined by the law in question. In a word, legislation would be practically at an end.

Naturally, the amazing character of this doctrine did not escape the attention of Justice Curtis, who had been spokesman for the court in the Hoboken case. If the Missouri Compromise did indeed comprise one of a class of enactments proscribed by the Fifth Amendment, what then, Justice Curtis inquired, was to be said of the Ordinance of 1787, which Virginia and other states had ratified notwithstanding the presence of similar clauses in their constitutions? What again was to be said upon that hypothesis of the act of Virginia herself, passed in 1778, which prohibited the further importation of slaves? What was to be said of numerous decisions in which this and analogous laws had been upheld and enforced by the courts of Maryland and Virginia, against their own citizens who had purchased slaves abroad, and that without anyone's thinking to question the validity of such laws upon the ground that they were not law of the land or due process of law? What was to be said of the act of Congress of 1808 prohibiting the slave trade and the assumption of the Constitution that Congress would have that power without its being specifically bestowed, but simply as an item of its power to regulate commerce? What finally, if the scope of congressional authority to legislate was thus limited by the Fifth Amendment, was to be said of the Embargo Act, which had borne with peculiar severity upon the people of the New England States, but the constitutionality of which had been recently asserted by the court in argument in the roundest terms.[29]

The plain implication of this apparently crushing counter-argument of Justice Curtis is that the Chief Justice was, at this point, making up his constitutional law out of whole cloth. Was this implication quite fair? The answer is that it was not, as a brief examination of the legal history involved will show.[30] What Taney was attempting to do in the section of his opinion above quoted was to engraft the doctrine of "vested rights" upon the national constitution as a limitation upon national power by casting round it the "due process of law" clause of the Fifth Amendment. But neither the doctrine of "vested rights" nor yet such use of "due process of law" was novel, and indeed the former was, in 1857, compara-

[29] Rep. 626–627; the Virginia cases cited are 5 Call 425 and 1 Leigh 172, and the Maryland case is 5 Harr. and J. 107. He might have added 2 Munf. (Va.) 393.

[30] See the writer on "The Doctrine of Due Process of Law before the Civil War", *Harvard Law Review*, XXIV. 366 *et seq.*; 460 *et seq.*

tively ancient. The doctrine of "vested rights" signified this: that property rights were sacred by the law of nature and the social compact, that any legislative enactment affecting such rights was always to be judged of from the point of view of their operation upon such rights, and that when an enactment affected such rights detrimentally without making compensation to the owner, it was to be viewed as inflicting upon such owner a penalty *ex post facto* and therefore as void. The foundation for the doctrine of "vested rights" was laid in 1795 by Justice Patterson in his charge to the jury in Van Horn *v.* Dorrance,[31] but more securely still by Justice Chase in his much cited dictum in Calder *v.* Bull,[32] in which he propounds what may be regarded as the leavening principle of American constitutional law, the doctrine, namely, that entirely independent of the written Constitution, legislative power is limited by its own nature, the principles of republican government, natural law, and social compact.

Reposing upon this foundation, as well as upon the principle of the separation of the powers of government, the doctrine of "vested rights" soon found wide acceptance, being infused by Marshall in 1810 into the "obligation of contracts" clause of the national Constitution[33] and receiving from Chancellor Kent in 1811 its classic formulation in Dash *v.* Van Kleeck.[34] Presently, however, principles hostile to the doctrine began to appear, particularly the doctrine of "popular sovereignty", which insisted in the first place upon tracing the sanctity of the written Constitution, not to a supposed relation to fundamental rights but to its character as the immediate enactment of the sovereign people, and in the second place upon the natural predominance of the legislature in government as comprising the immediate representatives of the people. From 1830 on, the doctrine of the "police power", that is, the power of the legislature to regulate all rights in the furtherance of its own view of the public interest, began to supersede the doctrine of "vested rights" as the controlling maxim of American constitutional law, receiving indeed from Taney himself, in his opinions in the Charles River Bridge case and License cases, a distinct impetus.[35] In this situation obviously the problem before those judges who wished to adhere to the older doctrine was to discover some phrase of the written Constitution capable of subserving the purposes of the doctrine of "vested rights". The dis-

[31] 2 Dall. 309 (1795).
[32] 3 Dall. 386 (1798).
[33] 6 Cr. 87, Fletcher *v.* Peck.
[34] 7 Johns. (N. Y.) 498.
[35] 11 Pet. 420 (1837); 5 How. 504 (1846).

covery was made by the North Carolina supreme court, in 1832, in the case of Hoke *v.* Henderson,[36] in which the use made of the phrase "law of the land" of the North Carolina constitution affords an exact counterpart to Taney's use of "due process of law" in Scott *v.* Sandford. From North Carolina the notion spread to New York, where it was utilized by Justice Bronson in 1843 in Taylor *v.* Porter.[37] The immediate source of Taney's inspiration, however, was probably—though there is no hint of the matter in the briefs filed by Sandford's attorneys—the decision of the New York court of appeals in the case of Wynehamer *v.* the People, in which, in the interval between the first and second arguments of the Dred Scott case, an anti-liquor law was pronounced unconstitutional under the "due process of law" clause of the New York constitution, as comprising, with reference to existing stocks of liquor, an act of destruction which it was not within the power of government to perform, "even by the forms which belong to due process of law".[38]

So much by way of justification of Chief Justice Taney. There is however another side to the matter. In the first place, as above hinted, Taney was performing in Scott *v.* Sandford what for him was a distinct *volte face* toward the doctrine of "vested rights". In the second place, he was availing himself of what at the time was decidedly the weaker tradition of the law. For not only had the doctrine of "vested rights", in 1857, generally gone by the board in its original form, but save in North Carolina and New York it had, in its new disguise, practically no hold anywhere. Essentially contemporaneous with the Wynehamer case were similar cases in an even dozen states. In all save one the law was upheld, and in that case it was overturned upon the basis of the doctrine of natural rights.[39] Furthermore, in only one court, that of Rhode Island, and that subsequently to the New York decision, was the "due process of law" or "law of the land" clause adduced as a limitation upon substantive legislation. Said the Rhode Island court on that occasion: "It is obvious that the objection confounds the power of the assembly to create and define an offense, with the rights of the accused to trial by jury and due process of law . . . before he can be convicted of it."[40]

[36] 2 Dev. 1, preceded by Univ. of N. C. *v.* Foy, 2 Hayw. 310 (1807). See also Webster's argument in the Dartmouth College case, 4 Wheat. 518, 575 *et seq.*

[37] 4 Hill (N. Y.) 140, preceded by the matter of John and Cherry Sts., 19 Wend. 676, and followed by White *v.* White, 5 Barb. 474, Powers *v.* Bergen, 6 N. Y. 358, and Westervelt *v.* Gregg, 12 N. Y. 209 (1854).

[38] 13 N. Y. 378, 420 (through Justice A. S. Johnson).

[39] *Harv. Law Rev.*, XXIV. 471–474.

[40] St. *v.* Keeran, 5 R. I. 497; see also 5 R. I. 185, and 3 R. I. 64 and 289.

This utterance may be taken, without hesitation, as decisive of the established interpretation of the "due process of law" clause in 1857. But all this is upon the assumption of a parity between Congress and the state legislature with reference to the doctrine of vested rights. In the third place, however, no such parity could, upon fundamental principles, have been justifiably conceived to exist at the date of Scott *v.* Sandford. The doctrine of "vested rights" rested upon the hypothesis of the recognition by the common law of certain fundamental rights which the people of the respective states possessed from the outset and which they could not be supposed to have parted with by mere implication in establishing the legislative branch of the government.[41] But these considerations were entirely irrelevant to the case of the legislative powers of Congress for two distinct, but equally powerful, reasons. In the first place it was a fundamental maxim in Taney's day that there was no such thing as a common law of the United States.[42] In the second place the power of Congress is not a loosely granted general power of legislation but a group of specifically granted powers. While, therefore, the federal courts from the very outset—though very sparingly in Taney's day—in cases which fell to their jurisdiction because of the character of the parties involved and in which therefore state law was to be enforced, repeatedly passed upon the validity of state laws under "general principles of constitutional law",[43] the United States was always conceived strictly as a government of delegated powers, neither deriving competence from, nor yet finding limitation in, principles external to the Constitution. It was therefore always a fundamental principle of constitutional construction with Marshall that within the sphere of its delegated powers the national government was sovereign, not merely as against the rights of the states but also against the rights of individuals, a point of view which he sets forth with great explicitness in his opinion in Gibbons *v.* Ogden[44] with reference to the commercial power of Congress and which Justice Daniel reiterates, so far as the rights of persons are concerned, as late as 1850 in United States *v.* Marigold.[45] True, Taney does find

[41] See J. Patterson in Van Horne *v.* Dorrance, cited above; also J. Story in Terrett *v.* Taylor, 9 Cr. 43 (1815), and in Wilkinson *v.* Leland, 2 Pet. 627 (1829).

[42] The leading case on this point is that of Wheaton and Donaldson *v.* Peters and Grigg, 8 Pet. 591, 658.

[43] See note 40, *supra;* see also J. Miller in Loan Association *v.* Topeka, 20 Wall. 655 (1874) and in Davidson *v.* New Orleans, 96 U. S. 97 (1877).

[44] 9 Wheat. 1, 196–197. The doctrine here stated is that the only limitations upon the power of Congress in the regulation of foreign and interstate commerce are the purely political limitations which arise from the responsibility of Congress to its constituents.

[45] 9 How. 560.

the restriction which he is applying in the Constitution itself, namely, in the "due process of law" clause of the Fifth Amendment, but what this admission signifies is simply this: that his use of the clause in question can draw no valid support from the earlier history of the doctrine of "vested rights", which upon fundamental principles was applicable only as a limitation upon the legislative power of the states, and that therefore its only justification is to be found in what, in 1857, was a relatively novel doctrine peculiar to the courts of two states.

But though Taney's invocation of the "due process of law" clause of the Fifth Amendment had so little to warrant it in the constitutional law of the day, it has received subsequently not a few tokens of ratification. Particularly is it noteworthy that the Republican opponents of the Dred Scott decision, instead of utilizing Curtis's very effective dissent at this point, now pounced upon the same clause of the Constitution and by emphasizing the word "liberty" in it, instead of the word "property", based upon it the dogma that Congress could not *allow* slavery in the territories.[46] After the Civil War Taney's Republican successor, Chase, used the "due process of law" clause of the Fifth Amendment in his opinion in Hepburn *v.* Griswold in the same sense in which Taney used it in Scott *v.* Sandford, but only as a limitation upon the implied powers of Congress.[47] This doctrine was flatly rejected by the Supreme Court, speaking through Justice Strong, in Knox *v.* Lee.[48] Yet a few years later, Justice Strong himself was elaborating the Taney-Chase point of view in his dissenting opinion in the Sinking Fund cases, and connecting it with Hoke *v.* Henderson.[49] Of late years too the same doctrine has shown a disposition to crop up repeatedly, though it is uncertain whether it has ever attained the dignity of formal decision.[50] Meantime of course, since the middle nineties, when the Supreme Court began to regard itself as the last defense of the country against socialism, it has been applying

[46] See the Republican Platform of 1860, para. 8. At this point the Republicans followed McLean's opinion rather than Curtis's. Note the significance in this connection of the discussion as to whether slaves were recognized by the Constitution; and also of the discussion as to whether slavery was recognized by natural law.

[47] 8 Wall. 603, 624; *cf.* J. Miller's cogent answer, *ibid.*, 637–638. Also, *cf.* the Chief Justice's own decision in Veazie Bank *v.* Fenno, in the same volume of reports, 533 *et seq.*

[48] 12 Wall. 457, 551. C. J. Chase elaborates upon his earlier argument under the Fifth Amendment at 580–582; he quotes the old dictum in Calder *v.* Bull to support his position.

[49] 99 U. S. 700, 737–739.

[50] See the various justices in the Northern Securities Company case, 193 U. S. 197, 332, 362, 397–400. See also J. Harlan in Adair *v.* United States, 208 U. S. 161, 172–174; *cf.* J. McKenna, *ibid.*, 180–190, and J. Holmes, 191.

steadily in modified form the North Carolina-New York doctrine in limitation of state legislative power under the Fourteenth Amendment.[51]

Turning finally to the consideration of our third main topic, namely the character of the issue between Chief Justice Taney and Justice Curtis upon the question of citizenship raised by Dred's attempt to sue in the federal courts, we find that it can be disposed of rather briefly. The usual view of the issue referred to is that it resolved itself into a dispute as to the relative weight to be given to the two conflicting sets of facts bearing upon the question whether negroes were in any case capable of citizenship at the time of the adoption of the Constitution, a dispute in which it is generally agreed that Justice Curtis had the weight of evidence on his side. This account of the matter is inaccurate. A careful comparison of Chief Justice Taney's opinion with that of Justice Curtis reveals the fact that the fundamental issue between the two judges, though it is not very specifically joined, is not whether there may not have been negro citizens of states in 1787 who upon the adoption of the Constitution became citizens of the United States, but from what source citizenship within the recognition of the Constitution was supposed to flow thenceforth. Upon this point, Curtis's view was that citizenship within the recognition of the Constitution in the case of persons born within the United States was through the states, while Taney's view was that a "citizen of the United States", to use his frequent phrase, always, unless descended from those who became citizens at the time of the adoption of the Constitution, owed his character as such to some intervention of national authority—was, in short, a product of the national government.[52] Curtis's theory, it can hardly be doubted, was that of the framers of the Constitution, wherefore Taney's pretense of carrying out not only the spirit but the very letter of the Constitution as it came from the framers, becomes at this point particularly hollow.[53] On the other hand, Taney's view is a very logical, and indeed inevitable, deduction from his whole body of doctrine with reference to the federal system. This doctrine, which came from the "Virginia School" after its disappointment at the failure of the

[51] See the writer on "The Supreme Court and the Fourteenth Amendment", *Michigan Law Review*, VII. 642–672. See also Holden *v.* Hardy, 169 U. S. 366, and Lochner *v.* the People of the State of New York, 198 U. S. 45.

[52] Taney states his position on this point at pp. 404–406 and 417–418 of the Report, and Curtis states his at p. 581.

[53] Taney translates the "citizens of each State" clause of the Constitution as "citizens of the United States", but the derivation of this clause from the Articles of Confederation forbids any such notion. See also *Federalist*, no. XLII.

Virginia and Kentucky Resolutions to establish the primacy of the states in the federal system, was the theory of the dual nature of that system: the states independent and sovereign within their sphere and the national government within its. This theory Taney had voiced from the beginning of his judicial career, so that, at this point at least, he was acting consistently with his past. Also, without doubt, the doctrine in question was pretty well established by 1857, both in judicial decision and in political thinking.[54]

To summarize: I conclude, first, that the Dred Scott decision was not *obiter dictum* within any definition of *obiter dictum* obtainable from a fair review of the practice of the Supreme Court, particularly under Marshall, in constitutional cases; secondly, that it was not based by the majority of those entering into it upon Calhounist premises; and thirdly, that Justice Curtis's supposed refutation of Taney's argument upon the question of Dred Scott's title to a *prima facie* citizenship within the recognition of the Constitution is a fiction. None of these results, however, goes far to relieve that decision of its discreditable character as a judicial utterance. When, as in this case, the student finds six judges arriving at precisely the same result by three distinct processes of reasoning, he is naturally disposed to surmise that the result may possibly have induced the processes rather than that the processes compelled the result, though of course such surmise is not necessarily sound; but when he discovers further that the processes themselves were most deficient in that regard for history and precedent in which judicial reasoning is supposed to abound, his surmise becomes suspicion; and finally when he finds that beyond reasoning defectively upon the matter before them, the same judges deliberately gloss over material distinctions (as for example, in this case, the distinction between sojourn and domicile) and ignore precedents that they have themselves created (as for example, in this case, the decisions regarding the operation of state decisions upon questions of comity) his suspicion becomes conviction. The Dred Scott decision cannot be, with accuracy, written down as usurpation, but it can and must be written down as a gross abuse of trust by the body which rendered it. The results from that abuse of trust were moreover momentous. During neither the Civil War nor the period of Reconstruction did the Supreme Court play anything like its due role of supervision, with the result that during the one period the military powers of the President under-

[54] For a statement of this doctrine, see Taney's opinion in the United States *v.* Booth, cited above, note 19. It should be noted in passing that this elucidation of the real issue between Taney and Curtis on the citizenship question throws additional light on the close relation existing in Taney's mind between the question of Dred's servitude and that of his citizenship.

went undue expansion, and during the other the legislative powers of Congress. The court itself was conscious of its weakness, yet notwithstanding its prudent disposition to remain in the background, at no time since Jefferson's first administration has its independence been in greater jeopardy than in the decade between 1860 and 1870; so slow and laborious was its task of recuperating its shattered reputation.

EDWARD S. CORWIN.